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No. 10-804 (4)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ALFORD JONES,

Petitioner,

v.

ALVIN KELLER, SECRETARY OF THE DEPARTMENT OF CORRECTION, AND MICHAEL CALLAHAN, ADMINISTRATOR OF RUTHERFORD CORRECTION CENTER,

Respondents.

FAYE BROWN,

Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF CORRECTION, ALVIN KELLER, SECRETARY OF THE DEPARTMENT OF CORRECTION, AND KENNETH ROYSTER, SUPERINTENDENT OF RALEIGH CORRECTIONAL CENTER FOR WOMEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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In this case, the North Carolina Supreme Court held that the federal Due Process and Ex Post Facto Clauses permitted the Department of Correction to refuse to reduce Alford Jones's sentence, notwithstanding the sentence-reduction credits DOC had concededly awarded him. That holding is one of *federal* law; it cannot be squared with this Court's precedent or with the decisions of other appellate courts; and its immediate consequence is that many North Carolina inmates who have been imprisoned since the 1970s will be forced to serve an additional 40 or 50 years after their legal sentences have expired. This is an extraordinary case, and this Court should grant review.

Nothing in the State's opposition casts doubt on that conclusion. Indeed, the State makes *no attempt at all* to defend the North Carolina court's federal constitutional analysis—recognizing, perhaps, that it is indefensible. Instead, the State seeks to recast the court's decision as nothing more than the acceptance, as a matter of "state law," of a state agency's "interpretation" of its "ambiguous" regulations. Opp. 12-13, 16.[1]

That effort fails. While the North Carolina court did purport to "defer" to DOC's "interpretation," it did not do so because it found the regulations "ambiguous." Rather, the court's "deference" to DOC's creation of a *post hoc* exception to its regulations was part and parcel of the court's analysis of the federal question. Pet. App. 9a-14a. Indeed, the court's decision that DOC's belatedly asserted "interpretation" of its regulations

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[1] The State does not contend that this Court lacks jurisdiction. Nor could it. The federal constitutional questions presented were properly raised and passed on below, and this Court has jurisdiction under 28 U.S.C. §1257(a).

was constitutionally permissible rested squarely on the court's balancing of what it called the inmates' "de minimis" liberty interest in sentence-reduction credits (Pet. App. 11a) against "the State's compelling interest in keeping inmates incarcerated until they can be released with safety" (*id.*; *see also* Pet. App. 13a). That analysis, if followed, would eviscerate the federal constitutional safeguards against arbitrary and retroactive deprivations of state-created rights.

Even if the State had accurately characterized the North Carolina court's analysis, the court's decision would not be immune from review simply because the federal question concerns an entitlement created by state law. To be sure, state courts are the final arbiters of state-law issues that arise independently of federal rights. But where, as here, the question is whether the State has unconstitutionally abrogated a pre-existing state-law entitlement, this Court need not defer to the state court regarding the contours of that pre-existing right. Doing so could prevent the Court from redressing an obvious constitutional violation. *See, e.g.*, *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 100 (1938) ("[I]n order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a [commitment] was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation."). That would be precisely the result here.

In short, this case presents a federal constitutional question of great import and great practical consequence. As the dissent observed, it was "a hard case" for the North Carolina court because it had "excited" a great deal of "[p]ublic attention." Pet. App. 31a-32a. The Governor had called the inmates' release "unacceptable" and implied that she would go to prison her-

self rather than see them freed. EJI et al., Amicus Br. 11. Quoting Justice Holmes, the dissent noted that such circumstances "exercise a kind of hydraulic pressure which makes what was previously clear seem doubtful, and before which even well settled principles of law will bend." Pet. App. 32a. Indeed, the state court's decision unquestionably bent well-settled principles by permitting the State to create an after-the-fact exception for a controversial group of prisoners, denying them the benefit of the sentence-reduction credits they had already earned. "Many would argue" that the court's decision not only bent the law, but reached "the breaking point." *Id.* It thus demands this Court's review.

I. THE NORTH CAROLINA SUPREME COURT WRONGLY DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW

Abandoning the North Carolina Supreme Court's federal constitutional analysis, the State makes only one argument against review of the decision below. Its view is that the state court correctly determined that Jones had no state-law right to have his credits used to reduce his sentence because DOC's regulations are "ambiguous" (Opp. 16), and that this predicate finding renders the constitutional analysis "of no consequence" (Opp. 19).

This argument mischaracterizes the court's reasoning and its holding. Had the court based its decision solely on the conclusion that DOC never granted Jones any credits that could reduce his sentence, it would have had no need to decide whether Jones received due process. But the court did decide that question, and its decision to "defer" to DOC's newly articulated "interpretation" of its regulations was inextricably bound up

with its misapprehension of what this Court's precedent requires. Indeed, contrary to the State's contentions, the court's holding flowed directly from its impermissible balancing analysis. *See* Pet. App. 13a (holding that, "[i]n light of the compelling State interest in maintaining public safety, ... DOC [need not] apply time credits for purposes of unconditional release to those who committed first-degree murder ... and were sentenced [under the 80-year provision]").

In reality, this case involves no genuine state-law question at all. The state court acknowledged all the state-law principles, and all the facts, necessary to demonstrate a violation of the Due Process and Ex Post Facto Clauses: (1) Until 2009, DOC wrongly "interpreted a life sentence imposed under [the 80-year provision] to be an indeterminate sentence that would expire only upon an inmate's death." Pet. App. 4a. (2) In fact, the "statute unambiguously defined Jones's sentence as a determinate term of imprisonment for eighty years." *Id.* (3) "DOC's regulations provide for good time, gain time, and merit time to be credited against an inmate's sentence." Pet. App. 6a. (4) DOC has always used those credits to reduce the sentences of prisoners serving determinate terms of imprisonment. Pet. App. 6a-7a. (5) "Jones had accrued" credits sufficient to mandate his release if "credited against [his] sentence." Pet. App. 2a, 6a-7a (citing regulations). The only holding consistent with the federal Constitution that can follow from these facts and legal principles is that DOC was required to release Jones.

The court avoided that conclusion by reasoning that, because DOC had "never used good time, gain time, or merit time credits in the calculation of unconditional release dates for inmates who received sentences of life imprisonment," and because, when Jones was

sentenced, DOC did not calculate a release date for him (Pet. App. 7a), the court could "defer" to DOC's "interpretation" that "it awarded Jones good time solely for the purposes of [determining] custody grade and ... [a] parole eligibility date, and not for the purpose of allowing Jones unconditional release" (Pet. App. 7a-8a).

As the dissent noted, however, DOC's position was not an "interpretation of its regulations" at all. App. 29a. DOC did not calculate a release date for Jones when he was sentenced because it mistakenly believed he was serving an indeterminate life sentence. And DOC did not apply sentence-reduction credits to determine unconditional release dates for inmates with indeterminate life sentences because doing so is logically impossible: Such sentences have no release date against which sentence-reduction credits can be applied. DOC's belief that Jones's credits would not reduce his sentence was simply part of its mistaken belief that he had been sentenced to natural life. In short, as the court elsewhere recognized (Pet. App. 4a), DOC's position was based on an incorrect interpretation of an "unambiguous" statute, not a "reasonable" interpretation of an "ambiguous regulation[]" (Opp. 18).

Put simply, this case does not present the question the State claims it presents: namely, whether DOC's position is a "reasonable" interpretation of the "ambiguous" regulations that existed when Jones was sentenced. Although DOC could presumably have announced, *before* awarding the credits at issue, that it interpreted its regulations to mean that inmates with 80-year "life" sentences could not use their credits to reduce their sentences, that is not what happened. It is undisputed that DOC did not articulate its current "interpretation" of its regulations until 2009, after *State* v. *Bowden*, 668 S.E.2d 107 (N.C. Ct. App. 2008), held that

inmates like Jones were serving determinate 80-year sentences for all purposes. Only after *Bowden* compelled DOC to correct its mistake did DOC decide that Jones's sentence-reduction credits were special, and would not have their ordinary, sentence-reducing effect.

The North Carolina court's "deference" to that *ex post* "interpretation" of Jones's pre-existing entitlement cannot permit its decision to evade this Court's review. Indeed, the *ex post* abrogation of such entitlements is precisely what the federal Constitution forbids. According "deference" to an agency's present interpretation of a pre-existing entitlement defeats that constitutional protection by "enabl[ing] the agency to make substantive changes in the guise of clarification." *Smith* v. *Scott*, 223 F.3d 1191, 1195 (10th Cir. 2000). Whether DOC's present interpretation comports with pre-existing law is thus "a federal question [courts must] determine for [them]selves." *Id.*

And that question is easily answered. The State has not identified a single inmate in North Carolina history who served a definite term of years but was denied the use of his sentence-reduction credits for the purpose of sentence reduction. Indeed, the State concedes that all prisoners except those serving "life sentences" receive credits "to calculate unconditional release dates." Opp. 3. That comports with DOC regulations defining good-time, gain-time, and merit-time credits as "credits applied to an inmate's sentence that reduce the amount of time to be served." Pet. App. 192a. And it is consistent with the plain meaning of "good time," "merit time," and other "time" credits: The inmate earns time off his sentence.

The State attempts to obscure the novelty of its contrary "interpretation" by suggesting (at, *e.g.*, Opp. 17) that those sentenced under the 80-year provision are still serving "life" sentences and that DOC never exercised its discretion "to grant credits toward unconditional release to inmates with life sentences." This wordplay is unavailing. As the State concedes, the relevant inmates are serving determinate 80-year sentences "for all purposes" (Opp. 12), and for inmates serving determinate sentences, DOC "use[s] the credits to calculate unconditional release dates" (Opp. 3). That the State continues to call Jones's 80-year sentence a "life" sentence only demonstrates the State's ongoing quarrel with the statute's unambiguous text—and DOC's fundamental departure from the longstanding practice it purports to interpret.

Lacking the ability to tie its present "interpretation" to any regulatory text or existing practice, the State in effect argues that—notwithstanding that DOC *did* award Jones sentence-reduction credits—Jones should not be able to use his credits because DOC would not have wanted to award them had it realized that Jones had a determinate sentence. But "[t]he federal courts" enforcing the Due Process and Ex Post Facto Clauses "recognize no doctrine of 'constitutional mistake.'" *Raske* v. *Martinez*, 876 F.2d 1496, 1502 (11th Cir. 1989). Thus, DOC's mistaken belief that Jones would never benefit from his sentence-reduction credits "by no means prevented [sentence-reduction rights] from vesting." *Id.* Indeed, the essence of the federal constitutional right is that state actors may not void pre-existing entitlements *even if* having granted those entitlements later proves mistaken or improvident.

But the concern that DOC had mistakenly granted Jones sentence-reduction credits—and the notion that,

under the circumstances, Jones's liberty interest in those credits was outweighed by the interest in keeping those convicted of first-degree murder incarcerated—was precisely what underlay the North Carolina court's holding. The court reasoned that, under this Court's precedent, "Jones's liberty interest in good time, gain time, and merit time is limited," and that "his liberty interest, if any, in having these credits used [to] calculat[e] his date of unconditional release is de minimis, particularly when contrasted with the State's compelling interest in keeping inmates incarcerated until they can be released with safety." Pet. App. 11a. The court acknowledged that DOC's regulations provided that good-time, gain-time and merit-time credits "reduce[] the amount of time to be served." Pet. App. 13a. But it reasoned that, because DOC mistakenly believed Jones had a natural life sentence, DOC "never considered that [its] regulations applied to Jones," and so it "did not fully prepare Jones for unconditional release." *Id.* The court thus held that, "[i]n light of the compelling State interest in maintaining public safety," DOC was not required to "apply time credits for purposes of unconditional release to those who committed first-degree murder" and were sentenced under the 80-year provision. *Id.*[2]

As explained in the petition for certiorari, this reasoning cannot be sustained. There is no support in this Court's cases or elsewhere for the notion that an interest in freedom from incarceration can ever be "de minimis." Nor is there any support for the notion that

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[2] If the court's holding were *not* premised on a balancing analysis, it could not logically have limited its holding to those convicted of first-degree murder, as to whom the "State['s] interest in ensuring public safety is particularly pronounced." Pet. App. 12a.

an inmate may be denied the benefit of sentence-reduction credits without any legal process because the "the State's compelling interest in keeping inmates incarcerated until they can be released with safety" outweighs those inmates' liberty interest in their credits. While safety is an important and laudable goal, generalized safety concerns have never been an adequate basis for a deprivation of liberty without any process or for a retroactive increase in punishment.[3] Indeed, the State neither disputes the petition's arguments on that score nor defends the lower court's reasoning. Because that reasoning, and its result, contravene basic constitutional principles, this Court should grant review.

II. This Court Is The "Ultimate Authority" On Whether State Actors Violate The Federal Constitution By Impairing Existing Entitlements

Contrary to the State's contentions, the North Carolina court's decision to "defer" to DOC's newly announced "interpretation" of its regulations in light of DOC's mistake regarding Jones's sentence and its interest in keeping inmates incarcerated is a decision of federal law—and a profoundly misguided one. But even if one were to accept the State's characterization of the North Carolina court's decision, this Court should still grant review.

This Court routinely reviews state-court decisions to ensure that preexisting state-law entitlements have not been impaired or ignored in derogation of federal

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[3] The State has never claimed that Jones or Brown poses any safety risk, and both have participated in community and work release without incident. Pet. App. 124a-126a, 153a-154a.

constitutional rights, both in cases implicating liberty interests protected by the Due Process and Ex Post Facto Clauses, *see, e.g.*, *Rogers* v. *Tennessee*, 532 U.S. 451 (2001); *Weaver* v. *Graham*, 450 U.S. 24 (1981); *Douglas* v. *Buder*, 412 U.S. 430 (1973); *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), and in other contexts in which the Constitution protects pre-existing state-law entitlements, *see, e.g.*, *Brand*, 303 U.S. 95 (Contract Clause); *Stop the Beach Renourishment, Inc.* v. *Florida Dep't of Envtl. Prot.*, 130 S. Ct. 2592 (2010) (Takings Clause); *Fairfax's Devisee* v. *Hunter's Lessee*, 11 U.S. 603 (1812); *Smith* v. *Maryland*, 10 U.S. 286 (1810) (federal treaties).

That review necessarily encompasses the question whether a constitutionally protected state-law entitlement exists in the first instance, and if so, what that entitlement requires. If the Court did not exercise independent judgment in that respect, "the constitutional mandate [could] become a dead letter." *Brand*, 303 U.S. at 100; *see* Wechsler, *The Appellate Jurisdiction of the Supreme Court*, 34 Wash. & Lee L. Rev. 1043, 1052 (1977) ("[W]here ... the existence or the application of a federal right turns on a logically antecedent finding on a matter of state law, it is essential ... [that the Court] consider the state question. Federal rights could otherwise be nullified by the manipulation of state law."); Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 Colum. L. Rev. 1919, 1925-1926 (2003).

The deference this Court will extend to state courts on such questions is, accordingly, limited: "[W]e accord respectful consideration and great weight to the views of the state's highest court but ... we are bound to decide for ourselves whether a[n obligation] was [created], what are its terms and conditions, and whether

the State has, by later legislation, impaired its obligation." *Brand*, 303 U.S. at 100. As the Court reiterated last Term, "[w]e do not defer to ... state judges in determining whether, for example, a state-court decision has deprived a defendant of due process." *Stop the Beach Renourishment*, 130 S. Ct. at 2608 n.9 (plurality); *see Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 756-757 (2005) ("despite its state-law underpinnings, [the existence of a protected entitlement] is ultimately [a question] of federal constitutional law").

In the end, the State's argument that the North Carolina court is the "ultimate authority" (Opp. 25) on the question whether Jones had a pre-existing right to sentence-reduction credits must fail because federal constitutional law renders the court's analysis and holding indefensible. For over thirty years, DOC mistakenly believed Jones had an indeterminate life sentence that could not be reduced. Only when DOC was forced by the courts to correct Jones's sentence did it seek to recharacterize the sentence-reduction credits Jones had already earned so they could not effect any sentence reduction. The Constitution forbids such a *post hoc* reinterpretation of an accrued liberty interest. And the state court's decision to "defer" to DOC's "interpretation" leaves Jones's constitutional rights at the mercy of the very party those rights are intended to restrain. It is abundantly clear that this Court need not let stand a decision of "state law" whose outcome is the circumvention of federal constitutional protections. It should not accept the State's invitation to do so here and thereby leave unlawfully incarcerated a substantial number of inmates who have already earned their freedom.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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